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Dismissals on economic grounds: Be careful when establishing and applying the criteria to determine the order of dismissals

In two rulings handed down on January 18, 2023, the *Cour de Cassation* (French Supreme Court) recalled that while the judge cannot substitute him/herself for the employer in establishing and applying the criteria to determine the order of dismissals (i.e. the order in which employee(s) will be dismissed) in the context of a dismissal on economic grounds, in case of dispute on the application of said criteria, the employer must disclose to the judge the objective elements on which it relied in order to make its choice.

The elimination or transformation of an employment position in the context of a dismissal on economic grounds requires the employer to determine which employee – among all those with comparable qualifications and corresponding to the eliminated or transformed position – should *in fine* be dismissed.

In the absence of any applicable collective bargaining agreement or other collective agreement, the employer must establish the criteria that will be used to determine the order of dismissals. For this purpose, it must take into consideration in particular:

- The existence of dependent relatives, in particular those of lone parents;
- the length of service within the relevant establishment or company;
- the situation of employees with social characteristics that make their reintegration into employment

- particularly difficult, e.g., disabled persons and elderly employees;
- the professional skills assessed by professional category.

While the judge may not substitute his/her assessment for that of the employer regarding the implementation of these criteria, he/she must, however, ensure that this assessment is not vitiated by a manifest error or a misuse of power.

Indeed, the employer must consider all the criteria to determine the order of dismissals but it remains free to give precedence to some of them as long as it applies them objectively and fairly to employees of the same professional category.

In two rulings issued on January 18, 2023, the *Cour de Cassation* upheld two decisions of the Grenoble Court of Appeals that ordered an employer to pay damages for having (i) applied an irrelevant and non-objective criterium – in the first ruling, and (ii) unequally and unfairly applied the criteria – in the second ruling.

An irrelevant and non-objective criterium

In the first ruling of the *Cour de Cassation*^[1], the employer had weighted the criterion related to dependent relatives by age brackets, thereby allocating two points for each child under the age of six, one point for each child between the ages of seven and twelve, and no point for children over the age of twelve.

As a result, and after application of the criteria to determine the order of dismissals, an employee with only one dependent student child did not obtain any point in this respect and was thus dismissed on economic grounds since her two colleagues, with children under the age of six, had been allocated additional points.

The employee considered that the employer's weighting of the criterion related to depended relatives was not justified and decided to challenge her dismissal.

In its decision subsequently upheld by the *Cour de Cassation*, the Court of Appeals found that that the employer had failed to demonstrate how the distinction made according to the age of the children was **relevant and objectively justified** with regard to the real costs of the children in view of their age.

Consequently, the employer was ordered to pay damages to the employee.

Unequal and unfair application of the criteria to determine the order of dismissals

In the second ruling of the *Cour de Cassation*^[2], the employer had given precedence to the criterion relating to professional skills to determine the order of dismissals, by rating the level of education of each employee. In this case, the two employees in question were both employed in the administrative department of the company.

The dismissed employee considered that the assessment of professional skills based on the level of education of each employee did not allow for an objective determination of whom of the two employees was the most

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suitable for the only remaining employment position in the administrative department, as the two employees both had an equivalent level of education.

The criterion relating to professional skills had, therefore, not been implemented in a fair manner.

The employer - which has sole discretion to assess the professional skills of its employees - also invoked the fact that the dismissed employee did not speak Spanish, contrary to the employee who had been maintained in the company.

In its decision subsequently upheld by the *Cour de Cassation*, the Court of Appeals found that the assessment of professional skill according to the level of education, as well as the interest of keeping a Spanish speaker in an agricultural establishment were not relevant. On these grounds alone, the Court of Appeals ruled that this resulted in an unequal and unfair application of the criteria to determine the order of dismissals.

Consequently, the employer was ordered to pay damages to the employee.

[1] Labor Chamber of the *Cour de Cassation*, January 18, 2023, No. 21-19.633

[2] Labor Chamber of the *Cour de Cassation*, January 18, 2023, No. 21-19.675

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